Picus v. Wal-Mart Stores, Inc. et al Doc. 38

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

MARGARET PICUS, an individual; on behalf of herself, and on behalf of others similarly situated, Plaintiff, vs. WAL-MART STORES, INC.; MENU FOODS INC; DEL MONTE FOODS COMPANY; SUNSHINE MILLS, INC.; CHEMNUTRA, INC.; and DOES 1 through 100, inclusive, Defendants.	Case No.: 2:07-cv-00682 **DEL MONTE FOODS COMPANY'S EMERGENCY MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STAY PROCEEDINGS**

TO THE HONORABLE PHILIP M. PRO, UNITED STATES DISTRICT JUDGE AND TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Defendant DEL MONTE FOODS COMPANY ("Del Monte") moves this Court on an emergency basis for an order staying all proceedings in this action pending a decision by the Judicial Panel on Multidistrict Litigation pursuant to 28 U.S.C. § 1407, and staying discovery until this Court decides the pending F.R.Civ.P. Rule 12(b)(6) motions seeking to dismiss the Plaintiff's Complaint, should this matter remain before this Court. In support thereof, Del Monte sets forth the following:

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I.

INTRODUCTION

To date, at least ninety state and federal actions have been filed across the country seeking relief for individuals who purchased allegedly contaminated pet foods from various Defendants. Del Monte is a Defendant in at least seven such federal lawsuits currently pending. Many of the lawsuits, including five in which Del Monte is named, are currently being transferred for coordinated pretrial proceedings pursuant to 28 U.S.C. § 1407 in the Northern District of New Jersey before Judge Noel L. Hillman under the caption, *In re Pet Foods Products Liability Litigation, MDL 1850.*

The Judicial Panel on Multidistrict Litigation ("JPML") initially ordered the formation of *In re Pet Foods Products Liability Litigation* on June 19, 2007 for the convenience of the parties and "to promote just and efficient pretrial discovery" since each lawsuit stems from the "recall of pet food products allegedly tainted by melamine found in wheat gluten imported from China…." See *The June 19, 2007 Transfer Order by the JPML, attached hereto as Exhibit "A."*

Many of the lawsuits being transferred to Judge Hillman seek to certify a class of United States residents who purchased the pet food at issue and seek compensation for alleged resulting damages. However, none of the pending classes have been certified since the cases are currently being transferred and discovery has not commenced.

A. Case Pending Before This Court

On or about April 30, 2007, Plaintiff, Margaret Picus, commenced suit against Del Monte in the Eighth Judicial District Court for the state of Nevada, by filing an action entitled *Picus v. Wal Mart, et al.*, Case No. A540315. On or about May 25, 2007, Del Monte filed a notice of removal of the Plaintiff's lawsuit from state court to the Federal District Court of Nevada. On June 20, 2007, this Court consolidated this matter under index number 2:07-cv-00682 PMP-LRL. On June 21, 2007, Del Monte filed a motion to dismiss, pursuant to F.R.Civ.P. 12(b)(6), seeking dismissal of the Plaintiff's Complaint for failure to state a cause of action. On July 5, 2007, Menu Foods, Inc. filed it's own motion to dismiss pursuant to F.R.Civ.P. 12(b)(6) seeking identical relief.

On June 26, 2007, this matter was conditionally transferred to the Northern District of New Jersey for consolidated pretrial proceedings by the JPML. See *The June 26, 2007 Conditional Transfer Order by the JPML, attached hereto as Exhibit "B."* On July 12, 2007 and 13, 2007, respectively, Plaintiff, and Del Monte, joined by Defendants Menu Foods, Inc., Wal-Mart Stores, Inc., and ChemNutra, Inc., filed a Notice of Opposition to the transfer of this matter. Briefs in support of these notices were recently filed with the JPML. A hearing with the JPML must be held. At the hearing, the JPML will decide where pretrial discovery will be conducted in this case. A date for this hearing has not been set.

II.

SUMMARY OF ARGUMENT

A stay of all proceedings is appropriate to further the interests of judicial economy and avoid undue prejudice unto Del Monte in light of the uncertainty regarding venue in this matter. If a stay is not granted this Court may unnecessarily waste its resources supervising pretrial proceedings and rendering rulings in a case that may shortly thereafter be transferred to Judge Hillman for consolidated pretrial proceedings. Del Monte would also be burdened by proceeding with this case due to the potential for duplicative discovery demands and inconsistent discovery rulings should this case ultimately be consolidated in the Northern District of New Jersey. Finally, a stay will not prejudice the Plaintiff in this case since this case is in its infancy.

In the alternative, should this Court not stay all proceedings, Del Monte seeks a stay of discovery. In accord with prevailing Ninth Circuit case law, this Court may properly stay discovery pending its determination of Del Monte's motion to dismiss since fact discovery is not necessary to decide the motion.

For these reasons, Del Monte respectfully moves this Court for an order staying all proceedings in this case pending a transfer decision by the JPML, and an order staying discovery until this Court's decision regarding Del Monte's pending motion to dismiss.

III.

ARGUMENT

A. PROCEEDINGS SHOULD BE STAYED PENDING THE JPML'S DECISION REGARDING TRANSFER OF THIS CASE.

It is "incidental to the power inherent in every court to control the disposition of the cases on its docket with the economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co.*, 299 U.S. 248, 254 (1936).

Numerous courts have used this power to stay proceedings pending the JPML's determination of whether the case in question will be transferred pursuant to 28 U.S.C. § 1407. *See, e.g. Parker v. Merck Co. Inc.*, Slip Copy, 2007 WL 1840247 (N.D. Cal. June 26, 2007); *Adams v. Tyson Foods, Inc.*, Slip Copy, 2007 WL 1539325 (W.D. Ark. May 25, 2007); *Gonzalez. v. American Home Products Corp.*, 223 F. Supp. 2d 803 (S.D. Tex. 2002); *U.S. Bank Nat'l Ass'n v. Royal Indem. Co.*, 2002 WL 31114069 (N.D. Tex. Sept. 23, 2002); *Moore v. Wyeth-Ayerst Laboratories*, 236 F. supp. 2d 509, 511 (D. Md. 2002); *Kohl v. American Home Prods. Corp.*, 78 F. Supp. 2d 885 (W.D. Ark. 1999); *Republic of Venezuela v. Philip Morris Companies, Inc., et al.*, 1999 WL 33911677 (S.D. Fla. 1999); *Rivers v. The Walt Disney Co.*, 980 F. Supp. 1358 (C.D. Cal. 1997); *American Seafood, Inc. v. Del-Val Fin Corp.*, 1991 WL 13725 (D. N.J. Feb. 1, 1991); *Rosenfeld v. Hartford Fire Ins. Co.*, 1988 WL 49065 (S.D. N.Y. May 12, 1988); *Portnoy v. Zenith Laboratories*, 1987 WL 10236 (D.D.C. Apr. 21, 1987).

When considering a motion to stay proceedings pending the JPML's decision, courts typically consider three factors: (1) potential prejudice to the non-moving party; (2) hardship and inequity to the moving party if the action is not stayed; and (3) the judicial resources that would be saved by avoiding duplicative litigation if the cases are in fact consolidated. See e.g., *Rivers*, 980 F. Supp. at 1360. These considerations echo the purpose of 28. U.S.C. 1407, which this Court recently stated is "to promote the just and efficient conduct of the actions transferred to the MDL court." *Elmore v. Merck & Co., Inc.*, Slip Copy, 2007 WL 956893, *2 (D. Nev. March 27, 2007).

1. Judicial Economy and Efficiency Mandate a Stay Pending a Decision by the Judicial Panel regarding the future venue of this case.

Considerations of judicial economy and efficiency weigh heavily in favor of a stay. Absent knowledge regarding where future pretrial discovery will be conducted, there is a substantial risk of inconsistent, duplicative and/or conflicting pretrial rulings on discovery and other key issues, such as class certification, should this motion be denied.

The Courts that have stayed proceedings pending the JPML's decision are uniform in their agreement with the above rationale. The following cases are illustrative.

Parker v. Merck Co. Inc., venued in the Northern District of California, concerned the much litigated drug, Vioxx. *Parker*, 2007 WL 1840247, *1. Prior to the commencement of Parker, the JPML established a transferee court for Vioxx litigation in the Eastern District of Louisiana. *Id.* *Parker* was "tagged" for transfer to the Eastern District of Louisiana while the Defendant's motion to dismiss was pending in the Northern District of California. The Defendant then moved to stay the case pending the JPML's decision of whether the case would be transferred. *Id.* The Northern District of California held that several similar actions were previously transferred to the MDL court and a stay of all proceedings was appropriate "in the interest of judicial economy and efficiency" without further explanation. *Id.* The Court noted that should the case not be transferred by the JPML, it would revisit the issues currently before it. *Id.*

In *Gonzalez v. American Home Products Corp.*, consumers brought a products liability action against manufacturers and distributors of phenylpropanolamine (PPA) to recover for physical injuries sustained as a result of exposure to PPA. *Gonzalez,* 223 F. Supp. 2d at 804. In granting the Defendants' motion to stay, the Court held that proceedings must be stayed pending the determination of consolidation by the JPML to avoid "duplicating the work of the MDL court." *Gonzales,* 223 F. Supp. 2d at 806.

In *Kohl v. American Home Prods. Corp.*, a consumer brought a products liability action against manufacturers, distributors and sellers of the pharmaceutical drugs Fenfluramine and Phentermine to recover for injuries allegedly caused by the drugs. *Kohl,* 78 F. Supp. 2d at 887.

In granting the Defendant's motion to stay pending transfer of the case to the MDL court, the court held that judicial economy would be best served if litigation was facilitated in the most appropriate forum. *Kohl,* 78 F. Supp. 2d at 888. "If the MDL motion is granted, all of the court's time, energy and acquired knowledge regarding the action and its pretrial procedures will be wasted." *US Bank,* 2002 WL 31114069 at *2.

Like *Parker*, *Gonzalez*, and *Kohl*, the interests of judicial economy and consistency warrant a stay in this case. Without a stay, this Court may be required to expend its time and resources familiarizing itself with the intricacies of this complicated litigation only to have it subsequently transferred to another court. The most efficient way to proceed would be to wait for the JPML's decision as to the where pretrial discovery will be conducted in this case.

Further, a stay will alleviate the potential for inconsistent substantive legal rulings. Should discovery commence in this Court before the case is transferred to the Northern District of New Jersey, many issues, particularly with respect to class certification, will be revisited by Judge Hillman. Thus, the commencement of discovery in this case may potentially result in inconsistent, duplicative and unnecessary efforts by the judiciary, and litigants and thereby frustrate the purpose of 28 U.S.C. § 1407. *See Elmore*, at *2.

In sum, given the uncertainty of venue in this lawsuit, a stay in this case is appropriate since it will further the just and efficient conduct of this litigation.

2. The Balance of Equities Weighs Heavily in Favor of a Stay as Plaintiffs Will Suffer No Prejudice, While Defendant Will Suffer Undue Hardship Should a Stay Not Be Granted.

In addition to the waste of judicial resources inherent in proceeding with this matter prior to a ruling by the JPML, the balance of the parties' hardships strongly favors a stay.

There is no doubt that Del Monte would be substantially prejudiced if this Court does not stay this case. If this case is not stayed, and is later transferred, Del Monte will be forced to engage in discovery and motion practice in multiple jurisdictions, thereby raising the likelihood of inconsistent or contradictory rulings. *American Seafood,* 1992 WL 102762 at *2 (holding that "[t]he duplicative motion practice and discovery proceedings demonstrate that judicial economy and prejudice to the Defendants weigh heavily in favor of a stay").

Notwithstanding the cost to Del Monte in having to engage in duplicative discovery, the possibility of inconsistent rulings prejudices Del Monte unnecessarily. See *Mathern v.* Wyeth, 2004 WL 1922028, 1 (E.D. La. Aug. 25, 2004) (granting motion to stay pending MDL determination to avoid conflicting rulings in the thousands of cases filed nationwide). This burden is a clear, definable hardship weighing in favor of briefly staying this action until the JPML renders its decision.

A stay will not, however, unduly prejudice Plaintiff. In *Republic of Venezuela v. Philip-Morris Cos., Inc., et al.,* the Republic of Venezuela sought damages from the Defendants due to *inter alia,* costs allegedly incurred as a result of paying for "medical care, facilities and services" for Venezuelan residents injured as a result of the use of tobacco. *Republic of Venezuela,* 1999 WL 33911677 at *1. The court, in granting Defendant's motion to stay, held that "upon consideration of what effect a brief stay may have on [Plaintiff], the court finds that Plaintiff will not be prejudiced by the granting of a stay pending the JPML's decision." *Id.*

There has been no discovery in the case before this Court or any of the consolidated actions. Since this lawsuit is in the beginning stages of litigation, the Plaintiff will not suffer any prejudice or inconvenience from a brief stay. This is not a case in which time is of the essence. Any slight delay that the Plaintiff may experience in this case will be minimal and the potential prejudice to Del Monte far outweighs any inconvenience to the Plaintiff. See *Arthur-Magna,* 1991 WL 13725 at *1 (noting that even if a temporary stay can be characterized as a delay prejudicial to Plaintiffs, there are considerations of judicial economy and hardship to the Defendants that are compelling enough to warrant such a delay).

Del Monte is not asking this Court to stay the proceedings indefinitely. The JPML will shortly set forth a hearing date at which time the fate of this case will be known. Del Monte is only asking the Court to issue a stay while the transfer decision by the JPML is pending. As such, any harm to the Plaintiff as a result of the delay is outweighed by the potential inefficiencies and prejudice avoided by waiting for the JPML's decision. The granting of a stay is necessary and appropriate.

B. DISCOVERY SHOULD BE STAYED PENDING THIS COURT'S DECISION REGARDING THE PENDING MOTIONS TO DISMISS.

The Ninth Circuit has held that it is appropriate for a District Court to stay discovery pending a motion to dismiss, pursuant to F.R.Civ.P. 12(b)(6), when the motion directly attacks the sufficiency of the Complaint and does not require fact discovery for its resolution. See *White v. American Tobacco Co.*, 125 F.R.D. 508 (D. Nev. 1989); *Rutman Wine Co. v. E.&J. Gallo Winery*, 829 F.2d 729 (9th Cir. 1987); *Jarvis v. Regan*, 833 F.2d 149 (9th Cir. 1985); *Rae v. Union Bank*, 725 F.2d 478 (9th Cir. 1984); See also, *Turner Broadcasting System, Inc. v. Tracinda Corporation*, 175 F.R.D. 554 (D. Nev. 1997).

As elucidated by this Court in *White v. American Tobacco Co.*, under current Ninth Circuit law, a district court may stay discovery because of a pending motion to dismiss pursuant to F.R.Civ.P. 12(b)(6) under two circumstances – "when it is convinced that the Plaintiff will be unable to state claim for relief" or when "there are no factual issues raised by the motion to dismiss…and discovery is not required to address the issues raised by Defendant's motion to dismiss." 125 F.R.D. at 510 (emphasis added).

In kind, the Ninth Circuit Court of Appeals, held in *Jarvis v. Regan*, that discovery is only appropriate when there are factual issues raised by the pending Rule 12(b) motion. *Jarvis*, 833 F.2d at 159. In *Rae v. Union Bank*, 725 F.2d 478 (9th Cir. 1984), the Ninth Circuit Court of Appeals similarly held that "since the appellant's complaint did not raise factual issues that required discovery for their resolution, the district court did not abuse its discretion in staying discovery pending a hearing on the motion to dismiss." *Rae*, 725 F.2d at 155.

In *Turner Broadcasting System, Inc. v. Tracinda Corporation*, this Court denied the Defendant's motion to stay discovery because a "strong showing" why discovery should be denied was not provided. 175 F.R.D. at 556. However, in denying this motion, this Court also noted that the motion to dismiss sought an interpretation of an agreement, and was not a "direct attack on the sufficiency of the complaint" like the motion to dismiss in *White*. Id. (citing *White v. American Tobacco Co.* 125 F.R.D. 508 (D. Nev. 1989)).

Del Monte's motion is in accord with this precedent. Del Monte's F.R.Civ.P. 12(b)(6) motion directly attacks the sufficiency of Plaintiff's complaint on its face, and does not require any fact discovery in order for this Court to decide their merit. See *Del Monte Foods Company's Memorandum of Points and Authorities In Support of Motion to Dismiss Class Action Complaint For Failure to State a Claim, filed with this Court on June 21, 2007, and attached hereto as Exhibit "C."* As such, this Court may appropriately stay this matter in light of the pending motions to dismiss.

IV.

CONCLUSION

For all of the foregoing reasons, it is appropriate for this Court to stay these proceedings. A stay would further the interests of judicial economy and promote just and efficient conduct of this litigation, while denying a stay would unnecessarily waste the efforts and resources of this Court and all parties. Without the stay, Del Monte will suffer undue hardship and inequity, and the purpose for coordination and consolidation pursuant to 28 U.S.C. § 1407 will be undermined.

Del Monte respectfully requests that this Court enter an Order staying further proceedings, including, but not limited to, Del Monte's obligation to file responsive pleadings in this matter, pending the transfer decision by the Judicial Panel, and an order staying discovery until this Court's decision regarding the pending motions to dismiss.

DATED: August 28, 2007

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